No. 80-289

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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED MINE WORKERS OF AMERICA, LOCAL NO. 1854 AND UNITED MINE WORKERS OF AMERICA, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD AND AMAX COAL COMPANY, A DIVISION OF AMAX, INC.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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The facts of this case are described in detail in the government's petition for a writ of certiorari in *NLRB* v. *Amax Coal Co.*, petition for cert. pending, No. 80-692. Briefly stated, this case arises out of petitioners' unsuccessful collective bargaining negotiations with respondent Amax Coal Company regarding Amax's coal mining operations at its Belle Ayr Mine in Wyoming, and the resulting strike that commenced in January 1975. Prior to the strike, petitioners had bargained to impasse with regard to, *inter alia*, three proposed contract clauses: The first proposal would have required Amax to continue

contributing to petitioners' existing multi-employer pension and welfare trust funds on behalf of the employees at the Belle Ayr Mine; the second proposal would have required Amax to apply the collective bargaining agreement to all other coal mining operations acquired or initiated by Amax during the course of the agreement provided that petitioners first established that they were the legal bargaining representative of the employees of that other facility; and the third proposal would have required Amax to impose the collective bargaining agreement on all licensees or lessees of its coal lands. Petitioners seek review of the court of appeals' decision insofar as it held that they violated the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, by bargaining to impasse and striking with regard to those three clauses.

1. Petitioners contend (Pet. 15-21) that the court of appeals erroneously concluded that a management-appointed trustee of a multi-employer pension or welfare fund established pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. 186(c)(5), represents management as well as the beneficiaries of the trust, and that therefore such a trustee is a collective bargaining representative within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act ("NLRA"), 29 U.S.C. 158(b)(1)(B). For the reasons stated in our petition for a writ of certiorari in No. 80-692, we believe that such a trustee owes an exclusive duty of loyalty to the trust beneficiaries and that at all events the trustee is not a collective bargaining representative for purposes of Section 8(b)(1)(B) of the NLRA. Because the court of appeals' contrary decision regarding this important issue misconstrues the language and purpose of the federal labor laws, and is at odds with the overwhelming weight of judicial authority, review by

this Court is warranted. Accordingly, we do not oppose the petition in this case limited to Question 1.

2. Petitioners also challenge (Pet. 21-26) the court of appeals' decision regarding the so-called Enabling and Coal Lands (or Application-of-Contract) Clauses. The Enabling Clause provides that "[t]his Agreement * * * covers the sub-bituminous coal or lignite mines owned or operated by [Amax]" (Pet. App. 101a, 210a), and the Coal Lands Clause states that "this agreement covers the operation of all the coal lands, coal producing and coal preparation facilities owned or held under lease by [Amax], or by any subsidiary or affiliate at the date of this agreement or acquired during its term * * * " (*id.* at 101a, 210a-211a). In other words, these proposals would have required Amax to apply the terms of the Belle Ayr contract to other coal mines acquired or operated by Amax during the course of the collective bargaining agreement, provided that petitioner first became the legal bargaining representative of the employees at such other facilities (*id.* at 101a-103a, 210a-211a).

Relying on its prior decision in *United Mine Workers of America*, 231 N.L.R.B. 573, 576 (1977), rev'd *sub nom. Lone Star Steel Co.* v. *NLRB*, No. 77-1667 (10th Cir. July 28, 1980), slip op. 28-34, the Board determined that these clauses were mandatory subjects of bargaining, and that therefore the Union did not violate Section 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(3), by bargaining to impasse and striking in support of these proposals (Pet. App. 212a-215a). The Board stated (Pet. App. 214a):

> [W]e conclude that both the enabling clause and the application-of-contract clause merely seek to preserve the employment opportunities of the employees in the existing unit by ensuring that the employees of any other operation put into

> production by [Amax] during the term of the proposed agreement, for whom the Union has obtained bargaining rights, will receive the same wages and benefits as the employees at the Belle Ayr Mine. In this manner, as the Board noted in *Lone Star Steel Company*, both clauses serve to "remov[e] the economic incentive which might otherwise encourage [Amax] to transfer . . . work to other mines under its control." Thus, it is manifest that both of the disputed proposals have a vital effect upon the terms and conditions of employment of the employees at the Belle Ayr Mine and therefore constitute mandatory subjects for bargaining.

The Board also found that the clauses would not require expanding the Belle Ayr bargaining unit to include employees at Amax's other facilities, but would merely require Amax to accept the same contract terms at the other facilities for the term of the contract; thereafter bargaining for a new contract could be conducted separately at the different facilities (Pet. App. 213a-214a).

The court of appeals reversed (Pet. App. 241a-244a). Although it recognized that "the Union has a valid concern in protecting the employees against a shift of production to another mine in order to evade the Union's standards and wages at Belle Ayr," the court held that the clauses proposed by petitioners were "much broader than necessary to accomplish this goal" (Pet. App. 243a). In particular, the court pointed out that the clauses would have required Amax to apply even the non-economic provisions of the Belle Ayr contract to its other facilities (*ibid.*).

The Board believes that the court of appeals should have deferred to the Board's view that the Enabling and Coal Lands Clauses are mandatory subjects of bargaining. The Board did not file its own petition with regard to this

issue, however, because the court of appeals accepted the principle that a proposal designed to protect the level of wages and working conditions within the bargaining unit by requiring the employer to maintain a comparable level of wages and working conditions elsewhere is a mandatory subject of bargaining (Pet. App. 243a-244a). Thus, the court of appeals disagreed with the Board only about whether the particular clauses proposed by petitioners in this case went beyond this legitimate purpose. But, should Question 2 of the petition for a writ of certiorari be granted, the Board will defend its decision and order on this issue.

3. a. Finally, petitioners challenge (Pet. 26-29) the concurrent ruling of the Board and the court of appeals regarding the validity of the so-called Leasing-Licensing Clause proposed by petitioners. That clause provides in pertinent part (Pet. App. 127a):

> Licensing out of coal mining operations on coal lands owned or held under lease or sublease by any signatory operator hereto shall not be permitted unless the work is performed by members of the United Mine Workers of America in the manner and to the extent permitted by law and that the licensing out does not cause or result in the layoff of employees of the Employer; provided, however, that either the licensor or licensee, lessee or sublessee makes the appropriate payments provided by this Agreement to the United Mine Workers of America Health and Retirement Fund and otherwise abide by the terms of the Agreement.

The Board concluded that this proposal violates Section 8(e) of the NLRA, 29 U.S.C. 158(e), and that the Union therefore violated Section 8(b)(4)(A) and 8(b)(3) of the NLRA, 29 U.S.C. 158(b)(4)(A) and (b)(3), by

bargaining to impasse and striking in support of this proposal (Pet. App. 127a-135a). The Board found that the proposal was intended to require Amax to interfere with the labor relations of the employer to whom it licensed out its mining operation, by requiring that such an employer recognize petitioners, employ only their members, and abide by the terms of the Belle Ayr contract for its employees. In short, the clause had a secondary objective, designed to benefit petitioners' organizing goals rather than to preserve work for Amax's employees. See *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644 (1967).

The court of appeals enforced this portion of the Board's order (Pet. App. 250a-251a). The court agreed that the restrictions contained in the clause would "serve[] only [petitioners'] organizing interests and does not protect the Amax employees' work standards" (*id.* at 251a). In addition, the court concluded that the clause would have required Amax to "cease doing business" with the licensee employer, within the meaning of Section 8(e). The court explained that "[s]ince the clause forbids Amax from licensing out coal mining operations absent compliance with the contract terms for the licensee's employees, Amax would be obliged to discontinue the licensing agreement if the licensee ever stopped recognizing [petitioners] or abiding by the other terms of [their] contract with Amax" (Pet. App. 251a).

b. The court of appeals correctly sustained the Board's determination that the particular Leasing-Licensing Clause at issue here violates Section 8(e) of the Act. As the court explained, "[t]he phrase 'doing business' [in Section 8(e)] refers to a continuing business relationship which is capable of being discontinued by one employer in order to force another employer to accede to union

demands" (Pet. App. 247a). And here, the Leasing-Licensing Clause contemplates a continuing landlord-tenant relationship between Amax and the licensee or lessee employer, which is capable of interruption by Amax in order to enforce petitioners' demands against that employer. In fact, the clause expressly renders Amax, the "licensor," jointly liable with the licensee for the latter's failure to make welfare fund contributions or otherwise to adhere to the collective bargaining agreement. In these circumstances, the courts of appeals have uniformly agreed that the proposed clause runs afoul of Section 8(e). See *Lone Star Steel Co.* v. *NLRB*, *supra*, slip op. 13; *NLRB* v. *Hotel & Restaurant Employees & Bartenders' Union Local 531*, 623 F. 2d 61, 66 (9th Cir. 1980).

Petitioners erroneously rely (Pet. 27-28) on cases involving true successorship clauses rather than the kind of Licensing-Leasing Clause at issue here. But a true successorship situation does not constitute "doing business" because there is a one time substitution of the purchaser for the seller as the operator of the same continuing business operation, rather than a continuing business relationship between, for example, a lessor and lessee. See, *e.g.*, *Lone Star Steel Co.* v. *NLRB*, *supra*, slip op. 9-27; *United Mine Workers of America*, *supra*, 231 N.L.R.B. at 574-575. Indeed, here, petitioners proposed both a successorship clause and a Licensing-Leasing Clause, and both the Board and the court of appeals, in accordance with well settled principles, found that the successorship clause, unlike the Licensing-Leasing Clause,

did not trench upon continuing business relationships in violation of Section 8(e). See Pet. App. 120a-127a, 246a-250a. Further review of this question is unwarranted.

Respectfully submitted.

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